K

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File No. O. Govt. of India/47
Legal Department-
A BRANCH

Subject:— Opinions under the Government of India Act, 1935.

P.57
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File No. O. Govt of India/47-169-L

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K.N.P.
11/5
S.C.

Office of the R.L.A.

The postman Keshavê Laxman Sonar is charge sheeted for offences under sections 409, 467 and 471 Indian Penal Code.

In a similar case in Re.K. Sannaya (I.L.R.(1941) Mad. P.258 at p.261). Rao J. observed :-

"The consent of the Governor General is, therefore, necessary for the prosecution for the offence under section 471 of the Indian Penal Code, nut there is no bar to the trial of the offence under section 409 and 467 of the Indian Penal Code and the trial can proceed in respect of these charges". Consequently, under section 270(1) of the Government of India Act, 1935, sanction of the Governor-General is necessary for the prosecution for the offence under section 471 Indian Penal Code.

The H.D. office view is not quite correct.

Sd. D.V.V.

O.C. Rembrancer of Legal Affairs.

U.R.D. No. 1040 dated the 30th January 1947.

K.N.P.

9/5

C.

Submitted.

The orders proposed to be issued(on pp.31-33) regarding acquisition of residential and non-residential property in this province by the Ruling Princes were once examined by the R.L.A. (vide R.L.A.'s No.338 Confl.20-12-1940). The changes now proposed to be made in the said orders are as shown in the statement of pp. 25-27 ante The rules are ~~non-statutory~~ statutory and as stated in R.L.A.'s opinion referred to above have no binding force and can be enforced only through the good office of the Crown Representative. These papers may be seen and returned.

S.W.D.

18/1

20

~~A.A.S.~~

B.W.P.

22/1

D.S.

A.K.R.

23/1

P.S.D.

U.r. to pre. No. 918 d. 25-1-1947

K.N.P.

9/5

A.C.

Office of the R.L.A.

The question for the consideration of the Remembrancer of Legal Affairs is whether legislation would be necessary for taking over the assets of the Bombay Gas Company Ltd. eiyher by the Municipal Corporation of Bombay or by Government.

2. The Bombay Gas Company Ltd. was incorporated in England for the purpose of introducing gas-works into the Presidency of Bombay and was registered under the ~~English~~ English Joint stock Companies Acts 1856 and 1857. The Gas Companies Act, 1863 (Bom. V of 1863) was enacted for giving powers and facilities to the said Company and to ~~enables~~ enable it to carry out the undertaking with gas in Greater Bombay (e.g.power to break streets, enter upon private land etc.)- see the preamble to that Act. There is no provision in that Act as in section 7 of the Indian ~~Electricity~~ Electricity Act, 1910 (IX of 1910) or section 30 of the Bombay Tramways Act, 1874) (Bom. I of 1874) enabling the local authority or the Municipal Corporation of the City of Bombay to purchase the undertaking of the Gas Company. sub-section (1) of section 299 of the Government of India Act, 1935, provides that no person shall be deprived of his property in British India save by authority of law. In the ansence of any provision in the existing law enanling Government or the Municipal Corporation to purchase the undertaking, it will be necessary ~~of~~ to have specific legislation in the matter. Such legislation would be within the competence of the Provincial Government

P.T.O.

under entry 26 ("Gas and gasworks") in the
Provincial Legislative List in the 7th Schedule
to the Government of India Act, 1935.

Sd.-

~~C.C.~~ Remembrancer of Legal Affairs.

U.R. to P.W.D. No. 1963, dated tye 27th~~6~~ February 1947.

~~4.6.D.~~
~~17-2~~

BM.

K.N.P.
9/5
4.C.

The village postman, D.A.Patil is arrested and charged for offence under sections 409 and 467 I.P.C. In a similar cases in Re.K.Sannaya (I.L.R. (1941) Mad. 1.258 at p. 261) Rao J. observed:-

"The consent of the G.G. is, therefore, necessary for the prosecution for the offence under sec. 471, I.P.C. but ther is no bar to the trial of the offence under secs 409 and 467 of the Indian Penal Code and the trial can proceed in respect of these charged."

Consequently under section 270(1) of the Government of India Act, 1935, sanction of the Governar General for offence under sections 409 and 467, I.P.C. will not be necessary (cf. R.L.A's opinion NO.5534 dated 6-8-46 and 1037-L,dated 27-9-46).

Sd.
13/3
A.L.R.

Reply may bee :-
Seen and returned
The view taken Sacned by H.D. is Correct (see R.L.A.S. opinious No. 5534 dated 3-6-1946, 1037-L. dated 27-9-1946 and 1040 dated 30.1.47

Sd.

R.T.Katwski

14/3

R.L.A. D.V.Vasa 14/3 4.v to H.D. No. 2828d.24-3-1947

K.N.P.
9/5
4.C.

Office of the R2. B.A.

Mr. Bata is apparently a Czechoslowak. His nationlity has however, no connection with the concern known as Bata shoe Company Ltd. It has been ascertained from the Registrar of the Indian Companies Act, 1913. The Memorandum of Association and the Artibles of Association of the Company are not available with the Registrar but it appears that since the Company has been carrying on its business at Batanager and Lahore it is a multi-anit corporation with powets to carry on its nusiness throuthout British India. Akthough, therefore, in virtue of Entry 27 "Trade and Commerce" and Entry 29 "roduction, supply and distrinution of goods" in the Provincial Legislative List it would be open to the Provincial Legislature to pass a law regulating trade and comjerce (commerce) and the production, supply and distribution of goods, it would not be competent for the Provincial Legislature to pass any law which in effect would impair the status or sterilize the activities of a company incorporated under the Indian Company Act, 1913. Any legislation aimed at preventing the Bata Shoe Co from carrying on its business in the Procince of Bomnay would, therefore, be ultra vires of the Provincial Legislature. It will not be also possible for the Provincial Legislature or Government ot pass any law or take any action prohiniting or restricting the import of shoes manufactured by the Bata Comany outside the Province, or Bombay into the province, for such a law or act will be hit by the provisions of section 297 of the Government of India Act, 1935.

The Capital Issues (Continuance of Control) Ordinance, 1947 recently promulgated bt the Government of India gives powet only to the Central Government to give consent to the issue of capital by a company whether incorporated in Brit India or not. Mere expansion of business, without fresh issue of capital cannot be prohibited even under that Ordinan and in any case not by the Provincial Government.

It seemstherefore that it is not legally feasible for

the Government of Bombay to prevent the acquistion or starting of factories by the Bata Shoe Company Ltd. in Bombay Province.

Sd.

10/5

o.c. Remembrancer of Legal Affairs.

U.R. to G.D.,No. 4798 dated the 12th May1947.

K.N.P.
9/5
4.C.

Office the R.L.A.

Statement of the Case.

The Secretary, Finance Department, in his note dated the 13th March 1946 at page 88 ante has obsetved as follows :-

"any passage concessions sanctioned by the Secretary of State for officers of his Services are 'allowances' within the meaning of sub-section (4) of section 247 of the Government of India Act, 1935 and are therefore, under that sub-section, 'charged' on the revenues of the Province. The existing constitutional position in regard to items of charged expenditure is that they are not subject to the vote of the Assembly though they may (with certain exceptions) be discussed in the Assembly: vide section 79(1) of the Government of India Act, 1935."

H.P.M. in his minute at p. 120 ante has observed as follows :-

"I regret I am unable to agree wiyh the opinion expressed by Secretary, F.D. in para. 2 of his note dated 13.3.1946 that any allowances which the Secretary of State may sanction to the Officers of his Services should, as a matter of course, be accepted as a charge on the revenues of India. These are extra benefits which the Secretary of State has sanctioned to the Officers of his Services to which these Officers were not entitled under the terms of their covenant on th date of the introduction of the Government of India Act, 1935. The expenditure on account of the grant of such concessions, therefore, ought not to be accepted as a charge on the revenues of the Province within the meaning of section 247 of the Government of India Act. I should, however, like to have the R.L.A's and the Advocate General's opinion on this point."

Section 247(1) inter alia provides thatthe conditions of service of all persons appointed to a civil service or a civil post by the Secretary of State shall --

(a) as respects pay, leave and pensions, and general rights in regard to medical attendance, be such as may be prescribed by rules to be made by the Secretary of State;

(b) as-respects other matters with-respect to which express provision is not made by this chapter, be such as may be prescribed by rulex to be made by the Secrerary of State in wonfar as he thinks fit to make such rules, and , in sofar- far and so long as provision is not made by such rules, by rules todbe made, ascrespects persons serving in conneftion with the affairs of the Federation, by the Governor-General or some person or persons or persons authorised by the Governor-General to kake rules for the purpose and, as respects persons serving in connection with the affairs of a Province, by the Governor ofthe Province or some person or persons AUTHORISED BY THE Governor to make rules for the purpose.

Sub.sections (2) and (3) of that section provide for promotion, leave and suspension and remuneration during suspension of a person appointed to a civil service or a civil post by the Secretary of State. Sub-section (4) then provides that the salary and allowances of any such person as aforesaid shall, if he is serving in connection with the affairs of the Province be charged on the revenues of the Province. Clause (a) of section 247(1) empowers the Secretary of State to make rules as respcts pay, leave and pensions only. Clause (b) of that section being a residuary one would embrance rules regylating allowances such as passage allowances. The relevant rules in this behalf are the Superior Civil Services Rules made by the Secretary of State for India in Council umder section 96 B(2)(3) of the old-Government of India Act. These rules have continued in force by virtue of the provisions of section 276 of the Government if India Act, 1935. Rule 12 of those rules layss down that in addition togthe pay prescribed by h the

said rules, passages shall be granted subject to the conditions set out in Schedule IV to memberof services and holders of posts ~~set~~ said out in Appendix A to that Schedule. Schedule IV contains regulations regarding passage benefits. Those benefits are admittedly allowances within the meaning of sub-section (1) of section 247 of the Government of India Act, 1935 and the additional concessions sanctioned by the Secretary of State under the Key Leave Scheme being of the same nature will have to be regared as allowances within the meaning of the said sub-section although they are extra benefits. There is no reason toput a limited ~~construction~~ Construction on the expression 'allowances' in sub-section (4) of section 247 and exclude from its ambit the additional concessions referred to.

As desired by H.P.M. the Advocate General is requested to give hih opinion on the question ~~on the~~ raised.

Sd.

19/10/46

O.C. Remembrancer of Legal Affairs.

U.M. to Advocate General, Bombay, No. 7219, dated the 21st-October 1946.

K.M.P.
9/5
A.C.

No.6 of 1947.

ADVOCATE GENERAL'S CHAMBERS,
HIGH COURT,
Bombay, 28th January 1947.

U.R. to the Advocate General, Bomaby, -
No.7219, dated the 21st October 1946.

O P I N I O N

Under the Key Leage Scheme, certain benefits by way of passages to and from England, for themselves and their wives and children were sanctioned, in favour of a selected members of persons in the services. The question is whether such benefits are allowances chargeable on the revenue of the Federation or Province as the case may be under Section 247(4) of the Government of India Act.

The Sub-Section provides that "the salary and allowances of any such person shall be charged --- etc." The word allowances must be taken to be used so as to include all payments except salaries. It is a very compehensive word, and unless there is abything in the Section or elsewhere in the Act to narrow its meaning, it should be taken to refer back to Sub-Section (1), and so to include the pensions referred to in Sub-Section 1(a), and all other matters" mentioned in Sub-Section 1(b).

"Passages money in the ordinary way, as specified in - Rule 12 of the Superior Service Rules, has always been recog-nished to be an allowence" wotjin the meaning of Sub-Section (4), and if extra passage money is granted and sanctioned by the appropriate authority, it would normally be an allowance also; unless Section 247(4) is construed to refer to and apply to, such allowances only as are actually in existence at the date when a person enters the service, and any subsequent benefits are ~~declared~~ treated as being outside the Section. This. however, is not supported by the words of the Sub-Section.

Sub-Section. On the contary Sub-Section 7 contemplates that case or class of cases may be dealt with by the --- Sectetary of State and ~~by~~ the Governor General in manner more favourabbe than under ~~ally~~ existing general rule. Rule 16 of the Superior Service Rules also contemplates a change by way of extention of the benefits to persons other than those listed in the Schedule. Of then the Secretary of State or the Governor General can make Rules from time to time so as to vary or add to the ~~neyssar all~~ Key Passage benefits were competent, within the ambit of Section 247 , and would fall w within the allowances covered by Sub-Section (8).

Sd.

C.K.Daptaray

28/47

Advocate General.

4 o.r. ToP. H.S.D. No. 991 and 28-1-1947.

K.N.P.
9/5
4.C.

Office of the R.L.A.

The only statutory restriction imposed by section 240(2) of the Government of India Act, 1935, is that no Government servant shall be dismissed from service by an authority subordinate to that by which he was appointed. There is no provision either in the Government of India Act or in the Bombay Civil Services Conduct, Discipline and Appeal Rules and the Civil Services (Classification, Control and Appeal) Rules prescribing any authority for holding a departmental inquiry. Consequently it appears that in regard to a P.W.D. to departmental inquiry it would be open to P.W.D. to appoint an officer of any department to hold such inquiry.

/ See Secretary of State for India vs. Lall (1945, F.C.R. 103) where an officer of another department was appointed to hold the inquiry. /

Sd.-

D.V.Vasa

O.C. Remembrancer of Legal Affairs.

U.R. to P.W.D.'s No.2541 dated the 15th March 1947.

K.N.P. 9/6

4.C.

Office of the R.L.A.

The question referred to the R.L.A. is whether a Parliamentary Secretary can continue to work as a Director of a Land Mortggge Bank.

2. There is no statutory prohinition upon the subject as in the case of the President and the Speaker under section 4 of Bom.Act No.II of 1937.

3. The position of Patliamentary Secretaries for this purpose can be considered from two points of view; (1) as crown servants and (2) as performing functions analogous to and in assistance of the Ministers.

4 In England Parliamentary Secretaries are appointed directly by the political chiefs or Boards under whom they act and like the Ministers they are treated as public officers and servants of the crown holding their appointments at the pleasure of the crown: (Halsbury's Laws of England, Second Hailsham edn.. Vo).6. 608). Here they are appointed by the prime Minister and from the Bombay Legislture Members (Removal of Disqualifications) Act, 1937 (Bom.Act No.I of 1937), it would follow that they are deemed to hold offices of profit under the Crown. Their pay and allowances are also fixed not under statute as in the case of Ministerw and Members of the Legislature but by executive orders:a(G.R. P. & S.D. No.1936/34 dated 29th May 1946). Although Parliamentary secretaries cannot be treated as members of the public service for the purposes of the constitution Act, or as Government servants to whom the Bombay Civil Services conduct, Discipline and Appeal Rules will apply, they must be regardbroadly speaking as crown servants, and the salutary principle contained in rule 21 of those Rules that a Government servant may not, without the previous sanction of Government, engage in any trade or undertake any employment while on duty or on leave other then his public duties, may, with equal advantage t
o the state, be extended to them.

to the state, be extended to them.

5. Similarly, in their second capacity as assistants to Ministers both in the Legislature and in the disposal of Departmental business, they can be subjected to the same restrictions as of the Ministers themselves. In 1906 the British Government laid down the rule that all Directorships held by the ministers must be resigned except in the case of Honorary Directorships in connection with philanthropic undertakings and Directorships in private companies; and a private company was later defined as one in which the interest of the Minister if a Director is substantially the same as the interest of a partner in a business firm. In 1924 this rule was extended by the Labour Government even to Trade Union officials and it has now become the settled practice and is still in force: (Jennings's Cabinet Government, pp.85-86). As the Parliamentary Secretaries in England are regarded as holding executive offices of the same kind as Ministers, presumably the rule applies to them also. The rule is practically on the same lines as rule 21 applicable to Government servants quoted above in paragraph . It provides an instance of the well-known principle that a man should not be put in a position where his private interest may conflict with his public duties. Moreover, in the discharge of their functions, Parliamentary Secretaries, though they may not have access to secret and confidential documents, are likely to gain knowledge and information of Government business as much as the Ministers do, and the convention applicable to Ministers can for that reason be extended to them also.

6. The question is thus one more of constitutional convention than of statutory prohibition, and on the

whole I am inclined to advise the resignation of the Directorship by the Parliamentary Secretary.

Sd.

P.M. Lada

5/5

c.c. Remembrancer of Legal Affairs.

U.R. to P.& S. D. No. 4618, dated the 6th May 1947.
(Also pl. see R.L.A/c No. 14529, Dt. 14/12/45)

K.N.P.
10/5

A.C.

Office of the R.L.A.

The agreement with Mr. Harpanhalli appears to have been a unilateral one. Clause 4 thereof did not give to Mr. Harpanhalli an unqualified right of employment for five years on the completion of his training. The agreement was for the benefit of Government alone who had incurred expenditure in training Mr.Harpanhalli, and it merely embedied a condition imposed upon the stipendiary traninee that inconsideration of his having received the training at Government expense in the Taining Centre he was liable, if so required, to serve Government for at least five years. It did not impose any corresponding obligation on Government to employ him on the completion of his period of training, or, having regained his services to continue him in employment throughout the period of five years. It was open to Government to dispense with his services even before the expiry of that period if they were found unsatisfactory. Under rule 33 of the Bombay Civil Service Conduct, Discipline and Appeal Rules, the discharge of a person engaged under a contract in accordance with the terms of his contract does not amount to a removal or a dismissal within the meaning of that rule. The agreement with Mr.Harpanhalli does not expressly provide for the termination of his service is terminable by a Governm--nt after giving him a month's notice. However, in the absence of any definite agreement and of any custom in the trade or calling, a contract of service is terminable by a reasonable notice. (Halsbury Laws of England , Vol.22 p.150; Smith: Master & Servant, 8th edition, p.44) The discharge from service of Mr.Harpanhalli can therefore be said to be in accordance with the terms of his contract. Since Bombay Civil Services Conduct, Discipline, and Appeal Rules are deemed to have been made under Section 241 of t the Government of India Act, thet would have to be read as p part of that Act; and therefore section 240(3) would not apply as this would not be a case of either dismissal or of removal which

latter is included in dismissal under Section 277. The matter would be governed by the Law of Contracts of Service. It appears, therfore, that the Mechanical and Transport Engineer, who has ~~executed~~ executed the agreement on behalf of the Governor, of Bombay, was competent to dispense with Mr.Harpanhalli's services by giving him a month's notice, without following the procedure laid down in section 240(3) of the Government of India Act.

Sd.-

P.M.LAD 3/6/47

o.c. Remebrancer of Legal Affairs.

U.R1 to Agriculturàà and Rural Development Depattment

No. 5805 dated the 3rd June 1947.

K:N.P.
10/5
4.C.

Office of the H.L.A.

Section 155 occurs in Chapter I.- Finance. Distribution of Revenue between the Federation and the Federal Units in Part VII relating to finance, Property, Contracts and Suits. The proviso to that section is therefore merely an enabling provision, indicating to what extent a Province is exempt from federal taxation & to what extent it is not so exempt. The provision contained in sub-section (1) of section 155 of the Government of India Act, 1935 does not by itself make this part of the trade or business of the province liable to income-tax, unless the Act concerned of the Fedetal Legislature, namely, the Indian Income-tax Act makes specific provision on that point. Turning to section 3 of the Indian Income-tax Act, 1922, we find that only the persons specifically mentioned in that section, namely, individuals, Hindu undivided families, Companies, Local Authorities, Firms, or other Associations of persons or the partners of the firm or members of the Association individually, are liable to income-tax. The Government of India's letter assumes that a Provincial Government has to be treated as an individual or an association of persons. That assumption seems incorrect. The word individual in this context does bot mean a legal entity; and the expression other associations of persons would have to be ordinarily construed ejusdem generis with the previous word especially in that setting. The very fact that local authority is separately specified supports the view that the expressions "individuals or association of persons" are not to be given the artificial meaning which the Government of India's letter seeks to give them. As the Provincial Government does not fall under any of the categories mentioned in this charging section, the Province is at present not liable to income-tax under the Indian Income-tax Act, even in respect of the trade or business carried on by it or on its behalf, outside the Province.

Sd.
P.M.LADA 18/6
o.c. Remembrancer of Legal Affairs.

Office of the R.L.A.

Except the provision in section 51 that the Ministers shall hold office during the Governor's pleasure there is no other provision in the Constitution Act which requires the Minister to vacate his office during his absence from India.

Sd.
P.M.LADE
19/6

O.S. Remembrancer of Legal Affairs.

U.R.to P.&S.D.,No.6386 dated the 20th June 1947.

K.N.P.
10/5
A.C.

The question for the consideration of the R.B.A. is whether the imposition of the urban immovable property tax on buildings and lands based on the an nual letting value of such buildings and lands in the Cantonment of Kirkee is lega.

In para 2# of R.L.A.'s No. 41 - confl. Dated 25-1-1946 at P. 17 slipped in B. Finance/46. The Subject-matter of the bill which became Bombay Act No.IX of 1946, was held to fall inter-alia, under entry No. 42 in List II in the Seventh Schedule to the Government of India Act, 1935. Accordingly, the Provincial Govt. is empowered under S. 100(3) of the said Govt. of India Act, to enact a law imposing a tax on Buildings in the Kirkee Cantonment under the said entry No. 42 and entry No. 2 in the Federal Legislative list does not bar the exercise of the said power. Thus sec. 104 of the G. of I. Act. 1935 does not apply. If approved, the R.L.A. may confirm the view expressed in the F.D. n ote dated 9.4.47 in xxx of p. 6 ante.

Sd. ...

D.D.P.
13/7/47.

A.A.L.R. I agree

14/7.

Ds. I also agree.

Reply may be. "The view taken in the F.D. office note dated 9.4.47 is correct.

Sd.
D.V.V. 17.7. S.B.Palekar 14.7.1947.

GJT. 15.6. 4 c. U.R. to F.D. No. 2# 7457 dt. 21.7.1947.

Office of the R.L.A.

In his minutes dated the 12th August 1947, H.P.M. has observed:

> "I have received a suggestion from an eminent lawyer that with a view to dispensing with the institution of temporary and acting judges and to have the services of retired High Court Judges, we may have a provision on the lines of section 8 of the Supreme Court of Judicature Act 1925 which enables the Lord Chancellor to request any person who has held the office of a judge of the High Court to act as a Judge of the Court of Appeal and every such person so requested while so sitting and acting have all the jurisdiction powers and privileges of a judge of the Court of Appeal, progided that nothing in the aecting in the section shallb deemed to require any such person to sit and act as a judge of the Court of Appeal unlesshe he consentws so to do."

Secretary, L.D. has been directed to examine the suggestion and to note his view before 18-8-1947.

2. The Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo.5., C.49) provides for the constitution of the Supreme Court of Judicature in England consisting of His Majesty's High Court of Justice (referred to as "the High Court") and His Majesty's Court if Appeal (referred to as "the Court of Appeal") with such jurisdicsion as is conferred on those courts respectively by this Act. Under section 29), the High Court shall be constituted of the following Judges, that is to say, the Lord Chancellor, the Lord Chief Justic, the President of the Probate Dicision. and the puisne judges of the several Divisions. Section 3 provides

> "(1) Subject to the provisions of this section, any judge of the Court of Appeal or any person who has held the office of a judge of the Court of Appeal or a judge of the High Court, may on the request of the Lord Chancellor, sit and act as a judge of the High Court or perform any other official or ministerial acts for or on behalf of any judge absent through illness or any other cause or in the places of many other judge whose place becomes vacant, or as an additional judge of any Division: Provided that --
>
> (a) the Lord Chancellor shall not request any person who has held office as aforesaid to sit and act as a judge of the King's Bench Division or the Probate Division, except with the concurrence of the Lord Chief Justice or the president of the Probate Division respectively ; and

(b)nothing in this section shall be deemed to require any person who has held office as aforesaid to sit and act as a judge of the High Court unless he consents so to do.

(2) Every person while sitting and acting as a judge of the High Court under this section shall have all the jurisdiction, powers and privileges of, but shall not otherwise be deemed to be, a judge of that court."

Under section 6, the Court of Appeal shall be constituted of ex-officio judges and of five ordinary judges; and the ex-officio judges of the Court of Appeal shall be the Lord Chancellor, any person who has held the office of Lord chancellor, any Lord of Appeal in Ordinary who at the date of his appointment would have been qualified to be appointed an ordinary judge of the Court of Appeal, or who at that date was a judge of that court, the Lord Chief Justice, the Master of the Rolls and the President of the Probate Division: provided that a person who has held the office of Lord Chancellor, or a Lord of Appeal in Ordinary, shall not be required to sit and act as a judge of the Court of Appeal unless on the request of the Lord Chancellor he consents so to do.

Section 8 provides:

"The Lord Chancellor may at any time, subject to the provisions of this section, request any person who has held the office of a judge of the Court of Appeal or of a judge of the High Court to sit and act as a judge of the Court of Appeal, and every such person so requested shall while so sitting and acting, have all the jurisdiction, powers and privileges of, but shall not otherwise be deemed to be, a judge of the Court of Appeal: Provided that nothing in this section shall be deemed to require any such person as aforesaid to sit and act as a judge of the Court of Appeal unless he consents so to do."

It is apparent from these provisions that the judges of the Court of Appeal and ex-judges of the Supreme Court are qualified to sit as judges of the High Court, and ex-judges of the Supreme Court and of the Court of Appeal as judges of the Court of Appeal. But they cannot be required so to do unless they consent. The view expressed by the lawyer to H.P.M. is correct.

3. The next question for consideration is whether a similar provision can be made to fill temporary vacancies in the High Courts in the Indian Dominion. Under section 9 of the Supreme Court of Judicature Act, 1925, it appears that barristers of a

certain standing are alone entitled to be appointed as Judges of the Supreme Court. In other words, it appears that these appointments are made directly from the Bar. The provisions in sections 3 and 8 are intended to overcome the difficulty of securing suitable persons for appointment in temporary vacancies in the Supreme Court of Judicature, for no practising barrister of merit can be persuaded to accept such temporary appointment at the risk of losing his lucrative practice. But the permanent and temporary appointments to the High Court judgeships in India have hitherto been made partly from the practising High Court pleaders and barristers and partly by promotion from the lower judiciary (see sections 220(3) and 222 of the Government of India Act, 1935). Consequently it would not be difficult to find suitanle persons for appointment as High Court Judges in temporary vacancies. If, however, Government desires to limit the eligibility to the High Court judgeship to the practising pleaders and barristers only, then it would be necessary to mend the Government of India Act, 1935, by inserting a provision on the lines of sections 3 and 8 of the Supreme Court of Judicature Act, 1925.

Sd.

D.V. Vyas

O.C.

Remembrancer of Legal Affairs.

K.N.P.
10/5
4.C.

Office of the R.L.A.

The contention of the Canteen Stores Department is not correct. A property leased by the Central Government cannot claim exemption from taxed under section 154 of the Government of India Act, 1935. Moreover under the terms of the leases the Central Government has expresely agreed to pay the municipal taxes and the urban immoveable property tax. Consquently the sheds erected by the Canteen Stores Department on the leased premises would be liable to the municipal tax and urban immoveable property tax.

Sd. -

P.M.LAD 26/8

O.C.

Remembrancer of Legal Affairs.

U.S.to R.D., No. 8703, dated the 27th August 1947.

K.H.P.
10/5
A.C.

Office of the R.L.A.

The quarters occpied by the Post Masters, Dapoli and Nangaon, being the property of the Central Government, would be exempt from the house tax under the Bombay Village Panchayats Act, 1933 firstly because, the Crown, not being expressly or impliedly named in the Act, would not be bound by it and secondly because, the property, vesting in the Central Government, is exempt from all taxes imposed by any authority within a Prpvonce (See sectopn 154 of the Government of India Act, 1935).

Sd. -

P.N.Lall

13/9

o.c. Memorandum of Legal Affairs.

U.R. to H. & L.C.D. No. 9210 dated 15th September 1947.

K.N.P.
10/5
4.C.

Office of the R.L.A.

In reply to a similar question raised ny the North Western Frontier Government the Remembrancer of Legal Affairs opined that the membership of a committee appointed by Government to examine cases of cloth retail licensee was not an office of profit within the meaning of clause (a) of section 69(1) of the Government of India Act, 1935 (see R.L.A's D.O.No.2067, dated 1st March 1947). An office of profit indicates an office which must proge to be source of gain. It is true that an M.L.A. appointed to serve on any committee is entitled to a daily allowance at the rates prescribed for Government servants; nut a daily allowance is intended tocoverthe the expenses of the member and cannot be considered a source of profit.. Consequently the membership of such committee is not an office of profit.

Sd.-

P.M.LAD 27/8

o.c. Remembrancer of Legal Affairs.

U.H. to Legislature Deptt., No. 8757 dated 28th August 1947.

K.H.P.
10/5

A.C.

Under sub-sect, (2) of Sect. 100 of the Govt. of India Act, 1935, as adapted by the India (Provisional Constitution) order, 1947, notwithstanding anything in sub-sect. (3). the Dominion Legislature, and subject to sub-sect. (1) a Provincial Legislature also, have power to make laws with respect to any of the matters enumeralted in List III in the Seventh Schedule. Entry 3 of List III provides for making laws with respect to "removal of prisoners and accused persons from one unit to another unit."

So under sect. 100(2) read with entry 3 of List III, Prov. Legislature can make laws for removal of prisoners and accused persons from one unit to another unit. Under sun-sect. (3) of sect. 100 subject to the provisons of sub-sects (1) & (2), the Prov. Legislature has and the Dominion Legislature has not, powet to make laws for a Progince or any part thereof with respect to any of the matters enumerared in list II in the Seventh Schedule. Under entry 4 of List II in the Seventh Schedule, the Provincial Legislature can make laws with respect to "prvisons, reformatives, Borstal institutions and other institutions of a like nature, and persons detained therein , and for arrangements with other units for the use of prisons and other institutions." The term "unit" as defined in sect. 311(2) read with Art. 3(3) of the India (Provisional Constitution), order, 1947, means a Governor's Province, Chief Commissioner's Province or an Acceding State. As Sangli State has acceded to the Dominion of India it is an Acceding State within the meaning of sub-sect. (5) of sect. 6 of the Govt. of India Act, 1935, as adapted by the India (Provisional Constitution) Order, 1947, and as such would fall within the meaning of the

term "unit" as defined in sect. 311(2). Consequently under sect. 100(3) read with entry 4 of List II in the Seventh Schedule it would appear competent for the Prov. Legislature tonmake laws pertaining to arrangement with the Acceding State of Sangli for the use of the Borstal Institution. The view expressed in para 3 of the H.E. Office note dated 24-9-47 appears to be c9rrect.

E.P.BHAMGARA
21/8

S.T.R.

I agree. Reply may be .
The view taken in para 3 of H.D.
Office note of pp. 13-14 is correct.

R.T.K...
22/10

R.L.A, P.M.LAD
28/10

U.R. to H.D. No. 10391 d. 30-10-1947

K.N.P.
10/5
4.C.

Office of the R.L.A.

Crown Property Gove Government of India Act, 1935.

The expression "property of the Crown for the purposes of the Government of the Province" is quite correct and there appears no objection to the use of it.

Sd.-

P.M.LAD 20/11

o.c. Remembrancer of Legal Affairs.

U.R. to R.D. No. 11126, dated the 21st November 1947.

K.M.P.
10/5
4.C.

Office of the R.L.A.

Section 247 of the Government of India Act, 1935, as adapted by the India (Provisional Constitution) Order, 1947, does not contain any provison as in the old section making expenditure on account of the salaries and allowances of persons appointed by the Secretary of State a charge on the Provincial revenues and in the absence of such a provision such expenditure will hereafter be subject to the vote of the Legislature. It is necessary , however, to consider whether section 247 as adapted is consistent with the provisons of section 10, of the Indian Independence Act, 1947, under which persons appointed by the Secretary of State or Secretary of State in Council and continuing on and after 15.8.1947 to serve the Government of either of the new Dominions or of any Province or part thereof are entitled to receive the same fonditions of servies as respects remuneration, leave and pension as they were entitled to immediatly before 15.8.1947. If the F.D. so desires the point will be pursued further, if necessary, in consultation with the Advocate General

Sd.-

S.B.Paleker

o.c. for Remembrancer of Legal Affairs.

U.R. to F.D., No. 13056 , dated the 17th December 1947.

K.N.P.

10/5
A.C.

Office of the R.L.A.

The Emergency Provisions (Continuance) Ordinance, 1946, was made in exercise of the powers conferred by section 72 of the Government of India Act, as set out in the Ninth Schedule to the Government of India Act, 1935. An Ordinance made under that section has, except in the case of an Ordinance made during the period specified in section 3 of the India and Burma (Emergency Provisions) Act, 1940, the force of law as an Act passed by the Indian Legislature for the space of not more than six months from its promulgation. The present Ordinance was made on 25th September 1946 and in view of the provisions referred to above, expired on 24-3--1947.

Sd.-

P.M.LAD 11/12

o.c., Remembrancer of Legal Affairs.

U.R. to P.W.D. No. 11945, dated the 11th December 1947.

K.M.P.
10/5

A.C.

Office of the R.L.A.

Under para. 11 or the Gove rnment of India (Constitution of sind) Order, 1936, the provisions of section 71 of the Governmenr of India Act (except sub-section (4) thereof) haye been made a plicable to the whole of Sind and thatpara. further provides that regulations may be made thereunder accordingly. In virtue of the provisons of the said section 71, the Sind Laws Regulation, 1936, was enacted and under section 2, read with the First Schedule of that Regulation, the Government Notification, Home Department (Political) No.1239-poll, dated the 18th May 1931, which immediately before the coming into operation of the said Regulation was in forec in the Division of Sind as a partof the Presidency of Bombay has, in its application to the Provinco of Sind, to be construed as if the expression, "Governor of sind", (this is analogous to Governor of Bombay in councial) were substituted by the expression , "Governor of Suhd", with the result that the notification has since the 1st day of April 1936 continued in force in the province of Sind as if it were issued by the Governor of Sind. For this reason, and not because the notification is in respect of a book punlished fromm Sind , the Sind Government would be competent to canel the notification.

It would be also competent forea the Government of Bombay to cancel the notifcation under section 99A of the Cide of Criminal procedure. If the intention is to remove the ban on the copies of translations in Sindhi of the Hindi book entitled "Bandi Jiwan", in both the Dominions of India and Pakistan, action should be taken both by the Government of Sind and the Government of Bombay for cancellation of the same.

K.N.P.
4.11/5

Sd.- P.M.LAD 30/12
o.c. Remembrancer of Legal Affairs.
U.R. to H.D.O. 3553 Dated the 31st December 1947.

Office of the R.L.A.

The Government of India Act, 1935, before its adaptation by the India (Provisional Constitution) Order, 1947, provided for the exercise of the different functions of the Governor under the Act -

(1) With the aid and advice of his Ministers,
(2) in his individual judgment, and
(3) in his discretion.

In cases relating to the functions exercisable with the said and advice of his Ministers the Governor was to be guided by such advice and it was, therefore, not essential that such cases should be shown to the Governor before decision. In regard to cases relating to the exercise of the functions in his individual judgment and in his discretion, the cases of necessity had to be submitted to the Governor before decision as the decision was to be solely his. Under the Constitution Act as now adapted, the Governor exercises all his functions with the aid and advice of the Council of Ministers and there are no functions exercisable in his individual judgment or in his descretion. The result is that in all cases he will now be guided by the advice of the Council of Ministers. Although, therfore, it may not be considered under the present Act essential that every such case should be shown to the Governor before decision, cases where the provisbns of the Act require the Governar to perform certain duties or to issue certain orders under his signature, would ordinarily have to be shown to him before the final decision is issued. What cases should be so shown to him before decision and what cases need not be so shown should more appropriately be settled by means of rules of business under section 59 of the Act.

Sd.
P.N.LADA
O.C. Remembracer of Legal Affairs.
U.R. to P.& S.D. No. 11566 dated the 3rd December 1947.

K.N.P.
**/5
4.C.